(5)

No. 98-1299

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF NEW YORK,

Petitioner,

vs.

MICHAEL HILL,

Respondent.

ON PETITION TO THE
NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Suite 382, Ebenezer Watts Building
47 South Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:
Robert Mastrocola,
Assistant District Attorney

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3139)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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QUESTION PRESENTED

Does a defendant's express agreement to a trial date beyond the 180-day period required by the Interstate Agreement on Detainers constitute a waiver of his right to trial within such period?

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JURISDICTION

The order/judgment of the New York Court of Appeals was entered on November 18, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a):

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioner timely filed a petition for writ of certiorari on February 16, 1999 and this Court granted the petition on May 17, 1999 (*New York v. Hill*, __U.S. __, 119 S. Ct. 1754, 67 U.S.L.W. 3528 [1999]).

STATUTES INVOLVED

Interstate Agreement on Detainers - N.Y. Criminal Procedure Law §580.20 (McKinney 1995) (set out in full at Appendix to Petition for Certiorari A-17). The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within Article I, Section 10 of the United States Constitution (*Cuyler v. Adams*, 449 U.S. 433 [1981]). The federal enactment of the IAD is at 18 U.S.C. app. 2.

STATEMENT OF THE CASE

This matter stems from an incident which occurred in the Rochester, New York suburb of Gates on New Year's Eve 1992 in which respondent and three companions robbed and shot to death Michael Weeks at a motel. (The codefendants Earl Williams, Jeffrey Tobias and Dearco Hill were convicted at separate trials.) Respondent was incarcerated on a criminal conviction in Ohio when in late December 1993 a detainer for murder and robbery charges was lodged against him there by New York authorities. In early January 1994 respondent was advised of the New York detainer and he then initiated the process for his return to New York pursuant to Article III of the Interstate Agreement on Detainers (IAD) (N.Y. Criminal Procedure Law §580.20 [App. to Pet. for Cert. A-17– A-26]).[1] In May, at respondent's initial court appearance in New York (arraignment), the People announced readiness for trial (App. 50, 51). Following pretrial motions and hearings the court, on January 9, 1995, set the matter for trial on May 1, 1995 with the express agreement of both the People and respondent, as reflected in the following colloquy:

> MR. PROSPERI [the prosecutor]: Your Honor, Mr. Huether from our office is engaged

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1 The detainer forms for respondent were in the name of "Leroy Foster"; respondent was indicted as "Michael Hill a/k/a Dwain Reid"; the trial court in its published decision on respondent's IAD motion captioned the matter with these names reversed but the state appellate courts used the name "Michael Hill" only.

> in a trial today. He told me that the Court was to set a trial date today. I believe the Court may have preliminarily discussed a May 1st date. And Mr. Huether says that would fit in his calendar.
> THE COURT: How is that with the defense counsel?
> MR. SCANLAN: That will be fine, Your Honor. (App. 35).

At that time the People again announced our continued readiness for trial (App. 36).

Shortly before trial then respondent brought a motion to dismiss the indictment pursuant to the IAD. He contended that he had not been brought to trial within 180 days of his request for disposition of the charges under the Agreement (App. 21-25). The People opposed dismissal, contending that there were a number of excludable periods such that the time limit was not violated (App. 26-32). The court found that the 180-day period commenced on January 4, 1994 when respondent signed his request for disposition of the charges pursuant to Article III. (The correct starting date, as respondent himself recognized in his dismissal motion [App. 24 (pars. 7, 8)]), was actually January 10, 1994 when his request for disposition was delivered to the court and prosecutor in New York [*Fex v. Michigan*, 507 U.S. 43 (1993)]; however, since the difference involved is only six days it has no bearing on the ultimate disposition of this matter as explained *infra*.) Of the time elapsed from this date to January 9, 1995 when the trial date was set (for May 1, 1995) the court found that 167 days were chargeable to the People and the rest of the time excludable for disposition of respondent's motions as a "necessary and

reasonable continuance" pursuant to Article III(a) of the IAD and/or as time that respondent was "unable to stand trial" pursuant to Article VI(a). The court thus determined that the dispositive time period was from January 9 to April 17, when respondent brought his dismissal motion. (Thereafter on appeal both sides would agree that this was the dispositive time period.) The court concluded that respondent had waived his right to trial within the 180-day period by expressly participating in setting the trial date beyond this period. The court noted that at the time the trial date was set the 180-day period had not expired and that the trial could have been held within this period if respondent so desired (*People v Reid*, 164 Misc.2d 1032, 627 N.Y.S.2d 234 [N.Y. Co. Ct. (Monroe Co.) 1995]) (App. to Pet. for Cert. A-11 – A-16). The court thus denied respondent's motion to dismiss and the case proceeded to trial. (The court issued its decision on the motion on May 2, 1995, the day before trial actually began.) Respondent was subsequently convicted, following a jury trial, of murder in the second degree and robbery in the first degree and sentenced on June 8, 1995 to concurrent, indeterminate terms of incarceration of 25 years to life on the murder conviction and 8 1/3 to 25 years on the robbery conviction.

On appeal the sole issue raised by respondent was whether the trial court erred in declining to dismiss the indictment for lack of a timely trial under the IAD and on November 19, 1997 the New York Supreme Court, Appellate Division, Fourth Department unanimously affirmed for the reasons stated in the decision of the trial court (*People v. Hill*, 224 A.D.2d 927, 668 N.Y.S.2d 126, 693 N.E.2d 755 [N.Y. App. Div. (4th Dept.) 1997]) (App. to Pet. for Cert. A-9 – A-10).

On further appeal (by permission) then the New York Court of Appeals on November 18, 1998 unanimously reversed the order of the Appellate Division and dismissed the indictment against respondent, concluding that respondent's concurrence in the later trial date did not constitute a waiver of his rights under the IAD (*People v. Hill*, 92 N.Y.2d 406, 681 N.Y.S.2d 775, 704 N.E.2d 542 [N.Y. 1998]) (App. to Pet. for Cert. A-1–A-8). The People thereafter petitioned this Court for certiorari review, which was granted on May 17, 1999 (*New York v. Hill*, __U.S. __, 119 S. Ct. 1754, 67 U.S.L.W. 3528 [1999]) (App. 55).

SUMMARY OF ARGUMENT

Pursuant to the Interstate Agreement on Detainers respondent had a right to be tried within 180 days (absent certain excludable periods) of the delivery to New York authorities of his request for disposition of the murder/robbery charges which were the subject of the detainer. Respondent was transferred to New York and following the disposition of pretrial matters and prior to the expiration of the 180-day period the court and the parties met to set a trial date. The court proposed a particular date and solicited the parties' positions as to such. Although the date was beyond the statutory period, defense counsel - in respondent's presence - expressly agreed to such, saying, "That would be fine." By so doing respondent waived his right to trial within the statutory period was not thereafter entitled to await the running of the period and then claim that it had been violated, requiring dismissal of the charges. The New York Court of Appeals erred in allowing respondent to do so; its order/judgment should be reversed and respondent's murder and robbery convictions reinstated.

ARGUMENT

A. The IAD's provisions for trial within certain periods are statutory rights which a defendant may waive.

The Interstate Agreement on Detainers (IAD) is a congressionally-sanctioned interstate compact within the compact clause (Art. I, §10, cl. 3) of the United States Constitution and as such is a federal law subject to federal construction(*e.g., Carchman v. Nash*, 473 U.S. 716, 719 [1985]; *Cuyler v. Adams*, 449 U.S. 433 [1981]). As the purpose of the IAD is to provide a nationally uniform means of transferring prisoners between jurisdictions such can only be effectuated by nationally uniform interpretation (*Reed v. Farley*, 512 U.S. 339, 348 [1994], *reh. denied* 512 U.S. 1277 [1994] [plurality]; *see also,* 116 Cong. Rec. 38841 [1970] [Federal Government joined the Agreement "so that all jurisdictions will have uniform and simplified rules for the disposition of detainers and the exchange of prisoners"]). IAD rights, like most other statutory rights, are waivable (as respondent conceded below)(*e.g., Yellen v. Cooper*, 828 F.2d 1471, 1474 [10th Cir. 1987]; *Webb v. Keohane*, 804 F.2d 413 [7th Cir. 1986]; *United States v. Rossetti*, 768 F.2d 12, 18 [1st Cir. 1985]; *United States v. Lawson*, 736 F.2d 835 [2nd Cir. 1984]; *United States v. Johnson*, 713 F.2d 633, 653 [11th Cir. 1983], *cert. denied sub nom. Wilkins v. United States*, 465 U.S. 1081 [1984]; *Brown v. Wolff*, 706 F.2d 902, 907 [9th Cir. 1983]; *United States v. Odom*, 674 F.2d 228, 230 [4th Cir. 1982], *cert. denied* 457 U.S. 1125 [1982]; *United States v. Boggs*, 612 F.2d 991 [5th Cir. 1980], *cert. denied* 449 U.S. 857 [1980]; *United States v. Eaddy*, 595 F.2d 341 [6th Cir. 1979]; *Camp v. United States*, 587 F.2d 397 [8th Cir. 1978]; *United States v. Palmer*, 574 F.2d 164 [3rd Cir. 1978], *cert. denied* 437 U.S. 907 [1978]; *see generally, United States v. Mezzanatto*, 513 U.S. 196, 200-201 [1995] [there is a presumption of waivability of statutory rights]; *Peretz v. United States*, 501 U.S. 923, 936-937 [1991] [the most basic criminal rights are subject to waiver]). This is especially so since, although providing prosecutors with a simplified, standard procedure for obtaining prisoners in other jurisdictions, the IAD - particularly the provisions establishing time limits for trial - is primarily for the benefit of the prisoner[2] (*see,Cuyler*, 449 U.S. at 449; *United States v. Oldaker*, 823 F.2d 778, 780 [4th Cir. 1987]; *Webb*, 804 F.2d at 415; *Eaddy*, 595 F.2d at 344; *Palmer*, 574 F.2d at 167; *United States v. Ford*, 550 F.2d 732, 742 [2nd Cir. 1977], *affd. sub nom. United States v. Mauro*, 436 U.S. 340 [1978]; *see also, Carchman, supra*, 473 U.S. 716; *Mauro, supra*, 436 U.S. 340; IAD, art. I).

The Second Circuit in *United States v. Lawson* (*supra*, 736 F.2d 835) held that waiver occurs where the defendant intentionally relinquishes his rights or takes any action that is expressly or impliedly inconsistent with the provisions of the IAD (*id.*, at 840). This standard best comports with reason and practicality by focusing on the effect of the defendant's conduct instead of the precise phraseology or timing thereof. It also has the advantage of eliminating the kind of semantic debate so aptly marked by the case at bar and thus is less problematic since it holds a defendant to the fair consequences of his actions and prevents him, even though he fully concurred in the

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2 Under Article III – a prisoner-initiated transfer as in this case – the period is 180 days (Article III[a]); under Article IV – a prosecutor-initiated transfer – the period is 120 days (from the prisoner's arrival in the receiving state) (Article IV[c]).

"contrary" procedure, from evading prosecution by claiming that he did not actually "request" such.[3]

On the facts of the case at bar, whether characterized as waiver, estoppel or some other rubric respondent's conduct clearly precluded him from any relief under the IAD.

B. Respondent waived his right to trial within the IAD period by expressly agreeing to a trial date beyond that period.

A prisoner "cannot by his own action manufacture a violation of the [IAD] and then seek relief under it" (*Oldaker*, 823 F.2d at 781; *Boggs*, 612 F.2d at 993), and there can hardly be anything more contrary to or inconsistent with claiming the

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3 Some circuit courts have described the waiver standard in terms of a defendant's "affirmative request for treatment contrary to the IAD" (*e.g.*, *Yellen*, 828 F.2d at 1474; *Brown*, 706 F.2d at 907; *Odom*,, 674 F.2d at 230; *Eaddy*, 595 F.2d at 344). The genesis of this language appears to be the *Eaddy* case, which involved the anti-shuttling provision of the IAD (prohibiting, following a defendant's transfer to the receiving state, his return to the sending state prior to disposition of the detainer charges [Arts. III(d), IV(e)]). The *Eaddy* court relied on two earlier cases in which the courts had found no violation of the anti-shuttling provision because the defendant had requested his return to the sending state (*Ford*, 550 F.2d at 742; *United States v. Scallion*, 548 F.2d 1168, 1170 [5th Cir. 1977], *cert. denied* 436 U.S. 943 [1978]) (*Scallion* described this result in terms of estoppel instead of waiver). The latter cases cannot be read as compelling a wholly different result had the defendants expressly agreed to a return instead of "requesting" such since there is no logical distinction between such concepts/conditions and thus *Eaddy* cannot be construed as establishing any such distinction.

right to trial within 180 days than actively participating in setting the date for trial beyond 180 days. That this makes eminent sense has been recognized by the vast majority of courts that have addressed this precise issue.[4]

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4 Initially, the issue of waiver by inconsistent conduct need not even be reached since respondent's agreement to trial beyond the statutory period may also be deemed a "direct" waiver (i.e., a voluntary waiver of a known right). While certain courts have on occasion applied the *Johnson v. Zerbst* (304 U.S. 458 [1938]) standard of "knowing, voluntary and intelligent" in determining whether a defendant aware of his IAD rights waived the same (*see*, *Eaddy*, 595 F.2d at 344; *Rossetti*, 768 F.2d at 19 & n.8 [expressly declining to consider whether defendant unaware of rights may waive such]; *but see*, *Crooker v. United States*, 814 F.2d 75, 78 [1st Cir. 1987] [same court, while finding IAD inapplicable on facts of case, states that defendant's transfer to other jurisdiction at his request would not be an IAD violation since "defendant cannot request what might be a violation of the [IAD], and then assert the requested action as grounds for his release"]; *Birdwell v. Skeen*, 983 F.2d 1332, 1340 [5th Cir. 1993] [generally discussing waiver in terms of *Johnson v. Zerbst* standard]; *but see*, *Boggs*, *supra*, 612 F.2d 991 [same court holds that defendant's own actions which result in IAD violations constitute waiver] and *Scallion*, *supra*, 548 F.2d 1168 [same court holds that defendant by his actions estopped from asserting IAD violation]), it is clear that the *Johnson v. Zerbst* standard, applicable to fundamental constitutional rights, does not apply to the statutory procedural rights established by the IAD which are concerned with minimizing the disruption to a prisoner's treatment and rehabilitation and which are not essential to a fair trial or the reliability of the truth-seeking process (*see*, IAD, art. I; *Yellen*, 828 F.2d at 1474; *Webb*, 804 F.2d at 414-415; *Lawson*, 736 F.2d at 835; *Odom*, 674 F.2d at 230; *United States v. Black*, 609 F.2d 1330, 1334 [9th Cir. 1979], *cert. denied* 449 U.S. 847 [1980]; *Camp*, 587 F.2d at 400; *State v. Burrus*, 151 Ariz. 581, 583, 729 P.2d 935, 937 [Ariz. 1986]; *Finley v. State*, 295 Ark. 357, (contd.)

Certainly affirmative assent to a trial date is "action that [is], expressly or impliedly, inconsistent with the provisions of the IAD" (*Lawson*, 736 F.2d at 840). Respondent's position, as apparently accepted by the New York Court of Appeals, seizes upon the "affirmative request" language occasionally used by some courts in discussing waiver (*see*, p. 8 n.3, *supra*) and mistakenly applies such quite literally; thus, he suggests that whether there is a waiver (i.e., an affirmative request) turns on which party - the defendant, the prosecutor or the court - "speaks first" during the relevant discussion, which wrongly

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363,748 S.W.2d 643, 646 [Ark. 1988]; *People v. Sevigny*, 679 P.2d 1070, 1075 [Colo. 1984]; *Webb v. State*, 437 N.E.2d 1330, 1332 [Ind. 1982]; *see also*, *Palmer*, 574 F.2d at 167 [IAD, in contrast to constitutional rights, "constitutes nothing more than a set of procedural rules"]; *see generally*, *Carchman*, *supra*, 473 U.S. 716; *Cuyler*, *supra*, 449 U.S. 433; *Mauro*, *supra*, 436 U.S. 340). Thus to the extent that certain courts, in expressly or impliedly making a distinction between a prisoner who is aware of his IAD rights and one who is not, suggest that waiver of a known right must meet the *Johnson v. Zerbst* standard, as opposed to merely a voluntariness standard, such is incorrect as imposing an unjustifiably stringent test; indeed, the same courts' holdings that a defendant may also waive IAD rights even if unaware thereof directly undercuts the idea that the *Johnson v. Zerbst* standard applies, as it is irrational to make waiver more difficult when the defendant is aware of his rights. Here, respondent himself initiated his return to New York under the IAD (Article III). IAD Form I (App. 3-6), which notified respondent of the detainer, also explicitly informed him of his right to request final disposition of the charges and that if he made such a request he would be "brought to trial within 180 days, unless extended pursuant to provisions of the [IAD]" (App. 4 [emphasis added]). Respondent's subsequent explicit agreement to a trial date beyond the 180-day period was unquestionably voluntary and thus constituted waiver of his right to an earlier trial.

places too much emphasis on the concept of abstract linguistics and too little on the notions of common sense and fairness. Thus under this approach had the exact same colloquy occurred here but with the parties simply reversed (i.e., defense counsel proposing the May 1st trial date and the court responding that such was "fine") respondent would have waived the time limit, but because it was the other way around he did not. This simply cannot be; it is illogical and serves no purpose but to promote gamesmanship by, e.g., encouraging attorneys to wait to see who is "first" to mention a trial date. It should be readily apparent that the outcome of an entire case – conviction or instead dismissal (and indeed this is a murder case) – should not turn on a point so fine that it amounts to nothing more than hypertechnical semantics. What is important is that respondent had the ability to choose whether to accept or reject the proposed trial date, and the effect of accepting such was exactly the same as if he had "affirmatively requested" the date in the first instance.

The Ninth Circuit recognized this in *Brown v. Wolff* (*supra*, 706 F.2d 902) when it found that the defendant had waived his Article III 180-day trial right by explicitly agreeing to certain continuances (*id.*, at 907; *see also*, *United States v. Hines*, 717 F.2d 1481, 1487 [4th Cir. 1983], *cert. denied* 467 U.S. 1214, 1219 [1984][indicating that defendant's rejection of proposed trial date - leading to later date beyond statutory period - constituted request for continuance and thus was request to be treated inconsistently with IAD]).

Various state courts have reached the same conclusion with specific reference to the setting of the trial date. Obviously if a defendant has "requested" or "proposed"/"suggested" a trial date beyond the time limit there is waiver (*e.g.*, *People v. Sampson*, 191 Cal. App. 3d 1409, 237

Cal. Rptr. 100 [Cal. Ct. App. 1987]; *State v. Aukes*, 192 Wis. 2d 338, 531 N.W.2d 382 [Wis. Ct. App.1995]; *see also, State v. Greenwood*, 665 N.E.2d 579 [Ind. 1996]). It has also been recognized, though, that a defendant's agreement to a date proposed by the court and/or prosecutor is to be given the same effect.

In *Moon v. State* (258 Ga. 748, 375 S.E.2d 442 [Ga. 1988], *cert. denied* 499 U.S. 982 [1991], *reh. denied* 501 U.S. 1224 [1991]) the court and the attorneys met to set a trial date and agreed on a tentative date which was outside the IAD period. Thereafter, following expiration of the period and just prior to trial, the defendant moved for dismissal pursuant to the IAD but the court determined that he had waived his IAD rights by agreeing to the trial date. (Although when the trial date was set the IAD time period had apparently not yet started defense counsel subsequently triggered it by obtaining defendant's transfer.) In *People v. Jones* (197 Mich. App. 76, 495 N.W.2d 159 [Mich. Ct. App. 1992]), the court, in finding waiver, expressly equated a defendant's agreement to a proposed trial date with an affirmative request for such date. The court in *State v. Harris* (49 Conn. App. 121, 714 A.2d 12 [Conn. App. Ct. 1998]) likewise found that the defendant's agreement to a continued trial date constituted waiver. In *Commonwealth v. Corbin* (25 Mass. App. Ct. 977, 519 N.E.2d 1367 [Mass. App. Ct. 1988]) the court excluded a period where the prosecutor had requested a certain trial date and the defendant "expressly acquiesced". The court in *Toro v. State* (479 So.2d 298 [Fla. Dist. Ct. App. 1985]) reached the same result in stating that since the defendant acquiesced in fixing the trial date he could not "be heard to complain". Similarly, the court in *Commonwealth v. Washington* (488 Pa. 133, 411 A.2d 490 [Pa. 1979]) found that the defendant's consent to a continuance of

trial beyond the statutory period tolled such period (*see also, State v. Schmidt*, 84 Haw. 191, 199, 932 P.2d 328, 336 [Haw. Ct. App. 1997] [defendant by his actions "impliedly consented" to untimely trial date]; *State v Moore*, 882 S.W.2d 253, 258-259 [Mo. Ct. App. 1994], *cert. denied* 513 U.S. 1130 [1995] [delay of defendant's trial resulting from his affirmative action or agreement is not to be included in limitation period; defendant there (*inter alia*) consented to certain continuances]; *State v Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 [N.C. Ct. App. 1986] [defendant's agreement by stipulation to trial on or before certain date constituted waiver of any right to be tried prior to end of such period]).

Still other courts, while not finding waiver on the facts of the cases presented, have signaled their approval of the principle that a defendant's consent/acquiescence to delay constitutes waiver (*e.g., Sevigny*, 679 P.2d at1075 [voluntary waiver "requires a showing of record that defendant or his attorney freely acquiesced in a trial date beyond the speedy trial period"]; *State v. Smith*, 686 S.W.2d 543, 547-548 [Mo. Ct. App. 1985] ["any delay of a prisoner's trial which results from his . . . agreement is not to be included in the period of limitation"; also citing with approval case holding it proper to exclude delay where defendant expressly consented to continuance beyond limitation period]).

The New York Court of Appeals, in concluding here that respondent's "mere concurrence" in the proposed trial date was not a waiver, cited to (*inter alia*) *United States v. Eaddy* (*supra*, 595 F.2d 341) wherein the court found that defense counsel's indication that he "did not care" where the defendant was held pending trial did not constitute a waiver of the anti-shuttling provision. While the logic of such reasoning is debatable, it cannot be disputed that there is a distinction

between expressing indifference to something and expressing affirmative agreement to it (*see*, *Webb*, 804 F.2d at 415 [defendant's request that he either be returned to sending jurisdiction or stay in receiving jurisdiction pending trial held waiver of anti-shuttling provision]). Also, the specific location of a defendant pending trial obviously is an ancillary issue which does not directly bear on the time of trial, unlike the situation as in the case at bar where the court and parties meet for the very purpose of setting the trial date. Moreover, it is not even apparent from the decision in *Eaddy* that counsel's indifference was in response to the trial court's (or prosecutor's) proposal to return the defendant to the sending jurisdiction, as the matter is characterized by the court in terms of the defendant's "failure to state a preference" as to his place of incarceration; here in contrast a particular trial date was expressly proposed and respondent's approval or disapproval thereof sought. (In addition, the *Eaddy* court also emphasized that there was no indication that the defendant there was aware, particularly from the detainer documents, of his Article IV [including anti-shuttling] rights, while as previously noted respondent here was informed in the detainer documents of his right to trial within 180 days.)

The New York Court of Appeals also cited in support of its holding *People v. Allen* (744 P.2d 73 [Colo. 1987]), a case relied on heavily by respondent in the state appellate process. However, while *Allen* on its face supports respondent's view, analysis discloses that other factors prompted the court's ultimate disposition of the matter, and in any event to the extent it stands for the proposition that agreement to a proposed date is not waiver it stands not only contrary to common sense and to the view adopted by almost all other courts but also as an anomaly within its own

jurisdiction.

In *Allen* the prosecutor initiated the defendant's return pursuant to Article IV. At arraignment the parties agreed to a trial date which was beyond the statutory period but no mention was made of the IAD. A short time later the court apparently became aware of the detainer and informed the prosecutor of a "detainer problem" but the prosecutor did nothing. The court thus set the case for hearing for the purpose of setting a trial date within the IAD limit. A new date was then set, with the parties' agreement, which was within the Article III (180-day) limit but still outside the Article IV (120-day) limit. (After the prosecutor had initiated Article IV proceedings the defendant had requested disposition of the detainer charges pursuant to Article III.) At the expiration of the 120-day period the defendant moved for dismissal under the IAD and the trial court, finding the case to be an "Article IV case", granted the motion. In denying the People's reconsideration request the court found that defense counsel was unaware of the Article IV status of the case when the new trial date was set and thus had not deceived the court.

On appeal the Colorado Supreme Court upheld the dismissal. While stating that "mere silence" at the setting of a trial date is not waiver and that instead "affirmative conduct evidencing such a waiver must be shown" (*People v. Allen*, *supra*, at 75-76), and acknowledging that it had recently held in a related context that waiver occurs when the defense freely acquiesces in a trial date beyond the statutory speedy trial period, the court nonetheless stated that the latter waiver concept is based on the fact that a defendant's participation in selecting a trial date would contribute directly to any violation (*id.*, at 76). The court went on to find that the defendant's acquiescence in the trial dates there had not directly contributed

to the IAD violation but rather the violation occurred because the prosecution was unaware of the precise character of the defendant's IAD rights and failed to comply with its obligations under the Act (*id.*, at 76-78). The court emphasized that the prosecution generally carries the burden of compliance with the IAD, and particularly in Article IV cases (in contrast to Article III cases) the prosecution has control over the running of the time period since it is its request which triggers the transfer. Since the prosecution there never informed the court or defense counsel of its Article IV request (it had also failed to provide the defense with necessary discovery, which would have included the detainer papers) and did nothing either to change the trial date even after the court learned on its own that the case involved a detainer or to fix a proper date even when the prosecution was aware that the court mistakenly believed that the case was an Article III case with a longer period, this "inaction" did not satisfy its burden of compliance with the IAD.

With all due respect to the *Allen* court, in the abstract one is hard-pressed to understand how a defendant's agreement to a trial date beyond the statutory period does not "directly contribute" to the occurrence of the trial beyond that period. In any event, though, it is clear that what drove that court to its ultimate disposition was its frustration with and disapproval of the prosecution, which egregiously mishandled the case through a series of omissions and general neglect (which is in stark contrast to the case at bar, where there is no indication of any "confusion" about applicability of the IAD [the trial court had itself signed one of the detainer forms (App. 18)]). The *Allen* court clearly strained to reach the result it did by adding the aforementioned "causation" test to the waiver standard, since it wholly ignored its own pronouncement in a case decided just a

few years earlier (*Sevigny*, *supra*, 679 P.2d 1070) that a voluntary waiver of IAD speedy trial rights occurs if the defense freely acquiesces in a trial date beyond the statutory period (*id.*, at 1075). Indeed, in a post-*Allen* case the Colorado Supreme Court reiterated this same principle (*People v. Newton*, 764 P.2d 1182, 1187 [Colo. 1988]) while at the same time claiming that it had "adhered" to such in *Allen* (*id.*) *Newton* was a case in which the defense had stood silent when the trial date was set, and the court noted that there was no indication that the defense had taken any "affirmative action" to "manifest approval of the trial date" (*id.*, at 1188 & n.5 [emphasis added]). Surely had the trial date been proposed to the defense and they had expressly agreed to such - as in the case at bar - the *Newton* court would have found such to be approval via affirmative action and thus waiver.

Not surprisingly, *Allen* itself was not a unanimous decision, and the dissenting Justices believed that a waiver had occurred. They noted that the majority equated "freely acquiescing in a trial date" with the "affirmative conduct" necessary to entail waiver, and yet although the defendant there had twice acquiesced in an an untimely trial date the majority still declined to find waiver (*Allen*, 744 P.2d at 79 [Vollack and Rovira, JJ., dissenting]). In the view of the dissent, "a defendant should not have the right to participate in the setting of the trial date beyond the speedy trial period and then claim a violation of the speedy trial provision" (*id.*, at 80).

Other cases in which courts have declined to find waiver have involved a defendant's silence in the face of the court's setting of a trial date. The general rationale of these cases is that "mere silence" cannot constitute waiver and there is no obligation of a defendant to object to an untimely trial date since the burden of compliance with the IAD is on the

prosecution (*e.g.*, *Roberson v. Commonwealth*, 913 S.W.2d 310 [Ky. 1994]; *State v. Dolbeare*, 140 N.H. 84, 663 A.2d 85 [N.H. 1995]; *State v. Edwards*, 509 So.2d 1161 [Fla. Dist. Ct. App. 1987]; *Smith*, *supra*, 686 S.W.2d 543; *State v. Arwood*, 46 Or. App. 653, 612 P.2d 763 [Or. Ct. App. 1980]; *Commonwealth v. Thornhill*, 411 Pa. Super. 382, 601 A.2d 842 [Pa. Super. Ct. 1992]; *accord*: *Birdwell*, 983 F.2d at 1340; *Brown*, 706 F.2d at 907). Whatever may be said of such analysis, and while under this view silence, from a defendant's standpoint, is indeed golden, silence is still silence and not, e.g., express agreement to/ approval of a proposed trial date. Webster's defines "silence" as "the state of keeping or being silent", i.e., "making no utterance", or "forbearance from speech" (Webster's Third New International Dictionary 2116-2117 [3rd ed. 1993]). Respondent here did not "stand silent" while a trial date was "set" by the court, and no amount of linguistic gymnastics can change this simple fact. Indeed, some of the same courts which hold that silence is not waiver have recognized the distinction between silence and express agreement (*e.g.*, *Smith*, 686 S.W.2d at 547-548 [delay resulting from defendant's agreement is excludable as waiver; also citing with approval case holding that express consent to continuance is excludable]; *Arwood*, 46 Or. App. at 657, 612 P.2d at 765 [consent is not silence but must be express]; *see also*, *Dolbeare*, 140 N.H. at 87, 663 A.2d at 86 [no indication that court held formal hearing in presence

of defendant or his counsel when it set trial date[5]]).

Other courts, however, have concluded that a defendant's failure to object to an untimely trial date is waiver (*e.g.*, *Drescher v. Superior Court*, 218 Cal. App. 3d 1140, 267 Cal. Rptr. 661 [Cal. Ct. App. 1990]; *Scrivener v. State*, 441 N.E.2d 954 [Ind. 1983]; *Schmidt*, *supra*, 84 Haw. 191, 932 P.2d 328; *State v Suarez*, 681 S.W.2d 584 [Tenn. Crim. App.1984], *overruled on other grounds in State v. Moore*, 774 S.W.2d 590 [Tenn. 1989]; *see also*, *Jones*, 197 Mich. App. at 81-82, 495 N.W.2d at 161 [noting that while defendant agreed to trial date he also did not object to such]; *State v. Brown*, 118 Wis. 2d 377, 386, 348 N.W.2d 593, 598 [Wis. Ct. App. 1984] [defendant's request for trial date anytime in month during which IAD time limit would expire and failure to object to date after the run date constituted waiver]; *Dolbeare*, 140 N.H. at 88-89, 663 A.2d at 87-88 [Thayer, J. and Brock, C.J., dissenting]; *McGann*, *supra*, 126 N.H. 316, 493 A.2d 452). Some of these courts equate failure to object with acquiescence [*e.g.*, *Drescher*, 218 Cal. App.3d at 1148, 267 Cal. Rptr. at 666; *Pethtel v. State*, 427 N.E.2d 891, 895 [Ind. Ct. App. 1981]; *see also*, *Allen*, 744 P.2d at 79 [Vollack and Rovira, JJ., dissenting]; *Thornhill*, 411 Pa. Super. at 389, 601 A.2d at 846, [Popovich, J., dissenting]; *State v. Garmon*, 972 S.W.2d 706,

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5 *Dolbeare* (*supra*) is similar to *People v. Allen* (*supra*) in that it was a split decision, with the dissent believing there was waiver and the majority decision appearing to conflict with recent precedent from the same court (*State v. McGann*, 126 N.H. 316, 493 A.2d 452 [N.H. 1985], in which the court cited approvingly an Indiana case holding that a defendant's failure to object to an untimely date constitutes waiver and in the case before it found that the defendant's silence as to whether to proceed with trial or to delay it was waiver).

711 [Tenn. Crim. App. 1998]). In *Reid v. State* (670 N.E.2d 949, 952 [Ind. Ct. App. 1996]) the court explained that while the defendant still had until the expiration of the time period to object "he sat idly by and did nothing" until after the expiration of the period (and shortly before trial) when he moved to dismiss, reflecting "a calculated and strategic ploy" to obtain dismissal, which the court declined to permit. Courts are certainly justified in disapproving conduct which amounts to "sandbagging" (*see, e.g., Freytag v. Commissioner*, 501 U.S. 868, 895 [1991] [Scalia, O'Connor, Kennedy and Souter, JJ., concurring] [defining sandbagging as "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later - if the outcome is unfavorable - claiming that the course followed was reversible error"][emphasis added]; *Wainwright v. Sykes*, 433 U.S. 72, 89 [1977], *reh. denied* 434 U.S. 880 [1977]).

This waiver-by-failure-to-object rule was applied by the Indiana Supreme Court in another case, *Reed v. State* (491 N.E.2d 182 [Ind. 1986]), which ultimately made its way to this Court on federal habeas review (*Reed v. Farley, supra*, 512 U.S. 339). The issue addressed by this Court was the availability of habeas review of IAD claims and the Court found such generally unavailable; thus it did not directly consider the substantive underlying issue of waiver vis-a-vis a defendant's role in the setting of a trial date. Justice Ginsburg, with the Chief Justice and Justice O'Connor joining, found that because the defendant had obscured the IAD's time prescription and avoided clear objection until the clock had run there was no cause for collateral review since there was merely an unwitting judicial slip, without aggravating circumstances, which did not rise to the level of a fundamental defect resulting in a miscarriage of justice or an omission inconsistent with the

rudimentary demands of fair procedure (*id.*, at 348-349). This was so even though the defendant had mentioned the IAD's prescription on trial commencement (this was an Article IV case [120 days]) in a number of motions he had filed prior to the expiration of the period; however, he did not refer to the specific provision at issue (Article IV[c]) or to the trial date previously set (*id.*, at 343-344). While Justice Ginsburg did not explicitly use the term "waiver" (although she did discuss the defendant's conduct in terms of "procedural default") Justices Scalia and Thomas (concurring in part and in the judgment) expressly characterized the defendant's conduct as waiver (*id.*, at 356-357). The dissenting Justices, however, were of the view that although not necessarily required to do so the defendant had repeatedly attempted to invoke the IAD protections in his written motions prior to expiration of the 120-day period (e.g., by requesting that trial be held within IAD guidelines, claiming that the state was forcing him to be tried beyond the IAD time limits and mentioning the "approaching" IAD limits). Relying on *Mauro* (436 U.S. at 364-365), in which the Court found that the defendant had not waived his IAD rights, even though he had failed to invoke the IAD in specific terms, where he persistently requested a speedy trial and asserted that the delay was causing him to lose privileges at his prison, the *Reed* dissenters concluded that the defendant had not waived or defaulted his IAD claim (*id.*, at 370-372).

Here in stark contrast respondent, after his initial request for disposition of the detainer charges while imprisoned in Ohio, never made any mention whatsoever of the IAD or even general speedy trial concerns; instead, while the statutory period was still running he expressly agreed to a trial beyond the period, thus ensuring a "violation", and only when the period had run did he then raise an IAD claim and seek

dismissal. Thus even under a more restrictive view of waiver one should have no difficulty concluding that the course taken by respondent here precludes him from obtaining a windfall of dismissal (with prejudice) of the charges.

However, a choice between these competing views as to whether a defendant must object to an untimely trial date need not be made because as repeatedly emphasized the case at bar does not involve silence but instead expression. The trial court here did not tell the parties what the trial date was and then simply leave them to whatever comments they desired to make (if any). Instead, the court merely proposed a particular date and expressly sought the parties' positions with respect to such. Defense counsel had every opportunity for input into the trial date determination. In fact, the proposal did not even come directly from the court but instead the prosecutor, who stated that he believed that the court "may have preliminarily discussed" the particular date. Thus defense counsel's express agreement when asked if the proposed date was acceptable cannot be treated as "silence" in the face of the court's "setting" of a trial date.

Respondent has suggested that defense counsel's agreement to the trial date was motivated by concerns of "civility" and "politeness", implying that the court "forced" the trial date on counsel, who had no choice but to accept lest he incur the court's wrath. However, such a claim is flatly refuted by the record, which instead shows that the court was quite solicitous of both sides. Indeed, as previously noted it was the prosecutor (who in fact was a stand-in for the assigned prosecutor, who was on trial elsewhere) who did most of the talking, mentioning that a "preliminarily discussed" date of May 1st was acceptable to the trial prosecutor, with the court then merely asking, "How is that with defense counsel?" Also,

respondent's argument in this regard suggests that the result would be just the opposite (i.e., he would not prevail) if indeed the prosecutor was the one to propose the date (since obviously even respondent would not contend that he would have felt constrained to accept such out of "fear" of or to be "polite" to the prosecution). This means that if the prosecutor in the colloquy here had merely deleted reference to "the court" in mentioning the proposed date this would be an entirely different case, which clearly makes no more sense than the view that the waiver issue turns on who speaks first (*see*, pp. 10-11, *supra*).

Beyond this, though, agreement is agreement and the reason for such is irrelevant; otherwise, a party (be it either side, as this principle cuts both ways) can (and will) always manufacture some after-the-fact explanation for their conduct in an effort to avoid the natural consequences of such. That this is so is evidenced here by defense counsel's reply to the People's response to his motion to dismiss (App. 53-54), where after the People emphasized counsel's agreement to the trial date he attempted to prop himself up by claiming that he was ready, willing and able to try the case at any time, which amounted to nothing more than post hoc rationalization.[6] Such is entitled to no more consideration than respondent's speculative, nonrecord references to such subjective concepts as the "personality" or "demeanor" of the court or the

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6 Although it must be noted that even then counsel stated that he had told the court's secretary that "any date in . . . January or February [was] acceptable" (App. 53-54), and in fact "any date in February" would have still been beyond the 180-day period (*see*, p. 2, *supra* [trial court found that at time trial date was set on January 9, 1995 there were 13 days left in the 180-day period (the correct figure was 19 days]).

"atmosphere" of the courtroom. Furthermore, at the same time counsel was attempting to "explain away" his agreement and avoid the fair consequences of such he also acknowledged that in agreeing to the trial date he was representing to the court that there was "no barrier" to trying the case on that date (App. 53 [emphasis added]).

Respondent has also suggested that part of the waiver test entails determining whether a delay "benefits" the defendant. However, no case requires such as a distinct and necessary component of waiver, and in any event when a defendant has expressly agreed to a delay it must be presumed that he did so for his own purposes, i.e., that the defendant deemed such to be to his benefit; otherwise, he would not have agreed to it. The relative "size" or worth of the benefit is irrelevant. Once again, any claim that a benefit to respondent was absent here is wholly unsupported; there was nothing on the record at the time the trial date was discussed indicating that respondent wanted an earlier trial date and/or that the time period between then and the agreed-upon date did not inure to respondent's benefit (by, e.g., at a minimum giving him more time to prepare for trial). In such instances there is no occasion to look beyond the agreement for an actual explication of the benefit(s). Indeed, at no time has respondent even alleged, let alone established, any prejudice whatsoever as a result of holding the trial a few months beyond the statutory period.

At bottom this case is a simple one. Respondent initially requested disposition of the detainer charges, triggering a statutory period within which trial was otherwise to be held. From respondent's initial appearance in court following his transfer the People were ready for trial and remained ready, never requesting any continuances. Prior to expiration of the statutory period a trial date outside the period was proposed and

respondent explicitly agreed to such. As the trial court expressly stated, trial could have been held within the period but such became unnecessary with respondent's assent.

To hold that a defendant can demand a trial within 180 days and then expressly agree to hold the trial beyond 180 days and still claim a right to discharge "borders on the ludicrous" (*Sampson*, 191 Cal. App. 3d at 1416, 237 Cal. Rptr. at 103, *quoting Russell v. State*, 624 S.W.2d 176, 179 [Mo. Ct. App. 1981]) and would sanction "manipulative abuse of the system" (*State v. Fuller*, 560 N.W.2d 97, 99 [Minn. Ct. App. 1997]). A defendant cannot be permitted to cause or contribute to, either unilaterally or through affirmative collaboration, an error which thereby allows him to wholly evade prosecution. The IAD, while providing the prisoner with a procedure for bringing about a prompt test of the substantiality of detainers placed against him, "gives him no greater opportunity to escape a conviction" (Council of State Governments, Suggested State Legislation Program for 1957, pp 76-77, 78 [1956]; S. Rep. No. 91-1356 [1970] *reprinted in* 1970 U.S.C.C.A.N. 4865).

CONCLUSION

The order/judgment of the New York Court of Appeals should be reversed and respondent's murder and robbery convictions reinstated.

Respectfully submitted,

HOWARD R. RELIN
District Attorney of Monroe County
Counsel for Petitioner
Suite 832, Ebenezer Watts Building
47 S. Fitzhugh Street
Rochester, New York 14614
(716) 428-5680

Of Counsel:

Robert Mastrocola

Robert Mastrocola,
Assistant District Attorney